95-1997

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AMERITAS INVESTMENT CORP., a Nebraska Corporation f/k/a BLN INVESTMENT CORP.,

Petitioner,

v.

STEVEN M. SLINKARD, An Individual,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF OKLAHOMA SUPREME COURT

BRIEF IN OPPOSITION

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The Respondent Stephen M. Slinkard respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Oklahoma Supreme Court's opinion in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

Ameritas should never have filed its petition for certiorari as this case presents none of the traditional grounds for the granting of such writ by this Court. This is a typical man bites dog case illustrating the abuse of the arbitration process by many of the larger brokerage houses. Having demanded disputes with its customers be solved by arbitration through a contract of adhesion and enforcing that right by motion to compel, Ameritas, not liking the results obtained in that arbitration, is seeking to overturn those results by an appeal on the merits. Realizing the arbitration process does not afford it the normal appellate review, Ameritas has attempted to clothe its displeasure with the substantive results of the arbitration in lofty claims of arbitrator abuse of authority, improper pre-emption, and deprivation of due process in an attempt to manufacture jurisdiction for this Court to hear its claims. This attempt fails miserably.

Rule 10 of this Court's Rules outline the three general considerations this Court examines in granting

or denying certiorari. Since this case arose through the Oklahoma state court system, general consideration (a) of Rule 10 is clearly inapplicable.

I. Jurisdiction Under Rule 10(b) and (c).

Ameritas, on page 1 of its Petition, claims jurisdiction under Rules 10(b) and (c). However, a fair reading of the body of its petition fails to reveal any basis for jurisdiction under Rule 10(b). There are no recent decisions of the United States Courts of Appeals that are in conflict with the decision by the Oklahoma Court of Appeals in this case. The Table of Authorities in Ameritas' Petition reveals seven decisions of the Courts of Appeals, it relies upon. Of those, four, *Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 n.5 (2d Cir. 1984); *Societe Generale de Surveilance v. Raytheon*, 643 F.2d 863, 867 (1st Cir. 1981); and *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977), are imbedded citations found in quotations from other cases.

A. Jurisdiction in Connection with the Second Question Presented

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993), while not noted in their Table of Authorities as such,

is a quote from the concurring and dissenting opinion of Judge Beam. This is the only Court of Appeals decision dealing with the second question presented that the lack of meaningful court review of the arbitrators' award of punitive damages results in a denial of due process to Ameritas.

Mr. Slinkard would point out that the decision of the Oklahoma courts in refusing to reverse the award of punitive damages on this basis is consistent with all of the decisions of the United States Courts of Appeals that his research has found. Most recently, in *Glennon v. Dean Witter Reynolds*, 83 F.3d 132 (6th Cir. 1996), the Sixth Circuit specifically rejected Ameritas' position that the FAA did not provide an adequate standard of review under this Court's decision in *Honda Motor Co. Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). The court first **assumed** that due process protections attach in the case of review of arbitration awards. It then considered:

> "[W]hether the FAA affords meaningful review to defendant's claim that no evidence supports the arbitration panel's punitive damage award. We conclude that the manifest disregard of the law standard permits vacatur of those punitive damage awards that are supported by no evidence. Since that standard of review would allow vacatur of those awards, it is necessarily

> meaningful review of claims that no evidence supports an arbitration panel's punitive damage award."

83 F.3d at 138.

The issue assumed by the Sixth Circuit was specifically addressed by the Eleventh Circuit in *Davis v. Prudential Sec., Inc.*, 53 F.3d 1186 (11th Cir. 1995). It held that both the award of punitive damages by the arbitrators and the confirmation of such award by the federal district court did not constitute state action so as to trigger due process protection. The court cited *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th cir. 1987); *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986); and *Austern v. Chicago Bd. Options Exch. Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 882 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990), in support of its position. *See also Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1990); and *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993).

The Tenth Circuit recently held in *Kelley v. Michaels*, 59 F.2d 1050 (10th Cir. 1995), that an award of punitive damages by arbitrators in the amount of slightly less than twice the actual damages

did not violate due process under the three-tiered approach of this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1, 17, 20-21, 111 S.Ct. 1032, 1042-1043, 1044-1045, 113 L.Ed.2d 1 (1991). In the present case, the award was roughly two and one half times the actual damage award.

Therefore, the decision in the present case not to reverse the arbitrators' award of punitive damages based upon due process grounds is clearly **not** in conflict with the decisions of the Courts of Appeals. Instead, the decision is clearly **consistent** with the existing precedent from these Courts. Therefore, Ameritas has not established jurisdiction under Rule 10(b) for the second of its "questions" presented.

These same decisions indicate that the Courts of Appeal find no inconsistency between the award of punitive damages by arbitrators and this Court's decisions in *Honda Motor Co. Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) or *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Ameritas has offered no support for such position other than the opinion of Judge Beam in *Lee v. Chica*, 983 F.2d 883, 889 (8th Cir. 1993). Based upon this absence of authority, Mr. Slinkard submits that Ameritas has not shown jurisdiction on this issue under Rule 10(c)

either. The decision in this case is consistent with the teachings of this Court.

B. Jurisdiction In Connection with the First Question Presented.

Ameritas' first question presented, dealing with the pre-emption of Oklahoma state law by the FAA, does not fair any better under Rules 10(b) and (c). As far as Rule 10(b) is concerned, only two decisions of the Courts of Appeal are cited as being in conflict with the decisions in the present case. These cases are from the First Circuit in *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), and the Second Circuit in *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1241 (1992).

Both cases pre-date what Mr. Slinkard believes are the controlling 1995 decisions of this Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); and *First Options v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). To the extent that the courts of appeals cases conflict with the later decisions by this Court, the decisions of the courts of appeals are no longer good law. For example, in light of this

Court's holding in *Mastrobuono*, the statement in *Fahnestock* that there is no conflict between the FAA and the *Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), case is no longer accurate. Further, Mr. Slinkard believes that these opinions may no longer represent the views of these Circuits in light of the more recent developments by this Court. For more recent views, *see Painewebber Inc. v. Elahi*, 1996 U.S.App. LEXIS 15949 (1st Cir. July 3, 1996); *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995), and *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996).

However, both cases appear to be cited largely for the proposition that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et. seq., does not pre-empt all state law. This is consistent with the statement in the "Questions Presented For Review" section that the first issue for review is the pre-emption of "the entirety of Oklahoma state law . . . by the Federal Arbitration Act." Ameritas attempts to re-enforce this position by stating on p.11 of its Petition: "A major underpinning of Mr. Slinkard's argument has been that all Oklahoma laws are pre-empted by the FAA simply because this case involved interstate commerce."

If, indeed, this was Mr. Slinkard's position, there would not only be a conflict between these two Courts

of Appeals decisions, but also a major conflict with the decision of this Court in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1253, ___ L.Ed.2d ___ (1989), and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___ , ___, 115 S.Ct. 1212, 1217, 131 L.Ed.2d 76, ___ (1995). Ameritas would, therefore, clearly have established jurisdiction under both Rules 10(b) and (c).

However, such is not the case. Ameritas has simply created a straw man which it then proceeds to knock down in an attempt to create jurisdiction. Mr. Slinkard has never maintained that the FAA displaces the entire body of state substantive or arbitrative law. His position, which is both simple and logical, is based entirely upon the already established teachings of this Court.

The beginning point is the application of the FAA. As acknowledged by Ameritas in the quoted language, this is a contract involving interstate commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). As such, it clearly comes within the terms of 9 U.S.C. § 2 and is controlled by the FAA.

This Court, in a series of cases, has made several important observations about the FAA and its

interplay with the state law and the state courts. It first identified the purpose of the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1241-1242 (1985), "and place such agreements 'upon the same footing as other contracts,'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453 (1974), *quoted with approval* in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. at 474, 109 S.Ct. at 1253. This purpose led it to conclude in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942 (1983), that Section 2 of the FAA "create[s] a body of **federal substantive law of arbitrability**, applicable to any arbitration agreement within coverage of the Act." [Emphasis added.]

Finally, *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984), held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Again, *quoted with approval* in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. at 478, 109 S. Ct. at 1255. This holding makes clear that as to **arbitrability of issues**, the contract of

the parties is controlling over any state statute or constitutional provision which is to the contrary.

The Court renewed its earlier positions in 1995 in *Allied-Bruce, supra*, saying:

> [T]his Court [has] decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court [has] concluded that the Federal Arbitration Act pre-empts state law; and it [has] held that state courts cannot apply state statutes that invalidate arbitration agreements.

115 S.Ct. at 838.

Based upon these holdings, Mr. Slinkard maintains that the FAA pre-empts any state law provision which prevents the parties from submitting any issue they desire to arbitration. In the present case, this means that any Oklahoma substantive law or arbitration provision preventing the parties from arbitrating issues such as punitive damages, attorneys' fees, or pre- or post-judgment interest would be pre-empted by the FAA. State law pre-emption is limited to those state statutory or common law provisions which directly interfere with the parties right to arbitrate any issue. This is a much narrower position than that claimed by Ameritas in its first "Question Presented" as to the total pre-emption. Mr.

Slinkard's position is neither inconsistent with the cited decisions of the Courts of Appeals or this Court.

Mr. Slinkard recognizes one important caveat to the above position created by *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1253, ___ L.Ed.2d ___ (1989). The Court in *Volt* held that the parties may, **by agreement**, replace the FAA as the controlling body of case law. Thus, in *Volt*, the parties elected to be controlled by California law rather than the FAA.

Ameritas incorrectly urges that *Volt* is controlling in the present case. In fact, *Volt* has no application to the present case for one important reason that Ameritas conveniently forgets. It only applies where the parties have agreed to waive application of the FAA. **There is no such waiver in the present case. To the contrary, the agreement between the parties as evidenced by the arbitration agreement itself, the NASD Submission Agreement, Mr. Slinkard's statement of claim submitted to the arbitrators, and the conduct of the parties during the arbitration all indicate that it was the intent of the parties to have the issues of punitive damages, attorneys' fees, and pre- or post judgment interest determined by the arbitrators.**

Paragraph 13 of Ameritas' customer agreement is a broad form arbitration agreement requiring the arbitration of "any controversy between us arising out of your business or this agreement...." See Petitioner's Brief, Appendix 14A, where the Oklahoma Court of Appeals quotes Paragraph 13 in full. Further, Ameritas signed the Uniform Submission Agreement which provides in Paragraphs 1 and 3:

> 1. The undersigned parties hereby **submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and related counterclaims and/or third party claims which may be asserted, to arbitration** in accordance with the Constitution, By-laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.
>
> * * *
>
> 3. * * * The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-laws, Rules, Regulations and/or NASD Code of Arbitration Procedure of the sponsoring organization.

The signed Uniform Submission Agreement is reproduced in the Appendix at p. App I-1.

The final paragraph of Mr. Slinkard's First Amended Claim, p.15, states:

> "As a result of all of the allegations set forth in the paragraphs, McQueen, and

> Ameritas are liable to Slinkard in actual damages as set forth at 71 O.S. § 408(a)(2)(A), which is the return of all money invested with McQueen, equal to the sum of $42,700, together with interest at ten percent (10%) per year from the date of payment, together with costs and a **reasonable attorneys fee**. Although all securities purchased by Slinkard from McQueen are worthless, Slinkard hereby tender any such securities to McQueen and Ameritas. **Slinkard further requests exemplary damages as specifically set forth herein in an amount in excess of $100,000, plus costs, attorney fees** and such other and further relief that the Arbitrator deems fair and equitable." [Emphasis added.]

Finally, during the course of the arbitration itself both Mr. Slinkard and **Ameritas requested** the arbitrators to award them attorneys' fees under 71 Okla. Stat. § 408(a)(2)(A).

These various documents and actions make clear that it was within the contemplation of the parties that the arbitrators had the power to, and were expected to, address the issues of punitive damages, attorneys' fees, and interest. Under the FAA, such agreement is sufficient authority for the arbitrators to consider the matters, and any state statutory or common law provisions to the contrary are pre-empted.

The correctness of Mr. Slinkard's position is borne out by this Court's decisions in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); and *First Options v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

Mastrobuono makes clear that the parties agreement, not state law, determines the scope of the arbitration or **arbitrability.** It said:

> [W]e think our decisions in *Allied-Bruce, Southland*, and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987), make clear that if contracting parties agree to include claims for punitive damages within the issues to arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

115 S.Ct. at 1215.

The Court also held in *Mastrobuono* that the parties showed the necessary intent to arbitrate punitive damages. In reaching this conclusion, the Court relied upon two things. First, it considered the language of the arbitration clause itself and said:

> [T]his clause strongly implies that an arbitral award of punitive damages is

> appropriate. It explicitly authorizes arbitration in accordance with [National Association of Securities Dealers, Inc.] rules; the panel of arbitrators in fact proceeded under that set of rules. The NASD Code of Arbitration Procedures indicates that arbitrators may award "damages and other relief." NASD Code of Arbitration Procedure ¶ 3741(e) (1993). While not a clear authorization of punitive damages, this provision appears broad enough at least to contemplate such a remedy. Moreover...a manual provided to NASD arbitrators contains this provision:
>
> B. Punitive Damages
>
> The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy.
>
> Thus, the text of the arbitration clause itself surely does not support--indeed contradicts --the conclusion that the parties agreed to foreclose claims for punitive damages. 115 S.Ct. at 1218.

Second, the Court applied the common law rule of contract construction that any ambiguity in the agreement should be construed against the interest of the party who drafted it. *Id.* at 1219.

These facts are all present in case at bar. The arbitration agreement is the same. It was an NASD arbitration, and the arbitrators and the parties had the

same NASD manuals. Finally, Ameritas, not Mr. Slinkard, drafted the arbitration agreement and sought to arbitrate the claims.

The *Mastrobuono* analysis applies equally to attorneys' fees and prejudgment interest. As will be seen below, Mr. Slinkard does not believe the Oklahoma Uniform Arbitration Act § 10, 15 Okla. Stat. (1991) § 810, or Oklahoma Securities Act § 408(a)(2)(A), 71 Okla. Stat. (1991) § 408(a)(2)(A), prohibit the arbitrators from awarding either attorneys' fees or pre- or post-judgment interest. In the present case, the Oklahoma Court of Appeals specifically held that post-judgment attorneys' fees had to be awarded by the arbitrators and neither party appealed this holding. However, to the extent that these provisions could be interpreted to prevent such awards, then under the rationale of *Mastrobuono*, they are pre-empted by the FAA.

As did the Oklahoma Court of Appeals in the present case, virtually every state and federal court to consider the issue has followed *Mastrobuono* and confirmed the arbitrators' award of both punitive damages and attorneys' fees. *See e.g. Davis v. Prudential Sec. Inc.*, 59 F.3d 1186 (11th Cir. 1995) (punitive damages); *Smith Barney Inc. v. Michalsky*, 53 F.3d 807 (7th Cir. 1995) (punitive damages);

Painewebber v. Landay, 903 F. Supp. 193 (D. Mass. 1995) (punitive damages); *Shearson Lehman Bros., Inc. v. Neurosurgical Associates*, 896 F. Supp. 844 (S.D. Ind. 1995) (both punitive damages and attorneys' fees); *In re Estate of Sandefur v. Greenway*, 898 S.W.2d 667 (Mo. App. 1995) (punitive damages); *Kintzelle v. J.B. & Sons, Inc.*, 658 So.2d 130 (Fla. App. 1995) (punitive damages).

Against this impressive list, Ameritas can cite only one case, the decision from a New York trial court, in *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc.2d 40, 631 N.Y.S.2d 215 (N.Y.Sup. Ct., 1995), refusing to follow this Court's decision in *Mastrobuono* holding that the FAA does not pre-empt New York law in the case of punitive damages. However, two more recent New York decisions, *In re Arbitration Between Prudential Sec. Inc. and Pesce*, 642 N.Y.S.2d 466 (N.Y. Sup. Ct., New York County, 1996), and *In re Lester Schwab Katz & Dwyer v. Yukevich*, 641 N.Y.S.2d 505 (N.Y. Sup. Ct., New York County, 1996), have followed *Mastrobuono* and held that arbitrators can award both attorneys' fees and punitive damages under the FAA in spite of the prohibitions of New York law. The court in *In re Arbitration Between Prudential Sec. Inc. and Pesce*, *supra*, simply stated: "This court is bound to apply *Mastrobuono* and the

issue of punitive damages is left to the arbitrators to decide." Id. at 468.

The *Yukevich* case is directly in point because the parties had signed no conflict-of-law clause. The court stated:

> *Mastrobuono*, is instructive with regard to the facts presented in this case--where the agreement contains no choice of law provision and mandates that all controversies be submitted to arbitration. In a situation such as this, the Supreme Court held that:
>
> > . . ., there would be nothing in the contract that would possibly constitute evidence of an intent to exclude punitive damages claims. Accordingly. punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would preempt the *Garrity* rule. Id. at ___, 115 S.Ct. at 1217.

641 N.Y.S.2d at 506.

In the alternative, if the above analysis does not convince the Court that the parties have specifically agreed to have the arbitrators consider punitive damages, attorneys' fees, and interest, then this Court's decision in *First Options, supra*, supplies a presumption that such matters are to be covered. *First Options* also dispels Ameritas' idea that **arbitrability** involves only the general agreement to arbitrate.

In *First Options*, the Court first held that arbitrability is normally an issue for the courts to determine, unless the parties have clearly submitted this issue to the arbitrators themselves. **Again the parties' contract, not state law, determines this issue.**

The Court then distinguished between **arbitrability in general** and **arbitrability of a particular issue**. Arbitrability in general concerns the question of whether the parties generally agreed to arbitration as a substitute for litigation, while arbitrability of a particular issue refers to whether the parties agreed to arbitrate such specific issues as punitive damages, attorneys' fees and interest. The Court held, in the case of general arbitrability, there is a presumption **against** finding an intent to arbitrate. On the other hand, the Court held, in the case of the scope of individual issues submitted to arbitration, there is a presumption **in favor of arbitrating.** 115 S.Ct. at 1924. *See also Painewebber v. Elahi,* 1996 U.S. App. LEXIS 15949 (1st Cir. July 3, 1996); *Painewebber, Inc. v. Landay*, 903 F. Supp. 193 (D. Mass. 1995).

The Court's analysis in *First Options* makes two points relevant to the present case. First, arbitrability involves **both** a determination of arbitrability in general

and whether the parties have submitted particular issues, such as punitive damages, attorneys' fees, and prejudgment interest to the arbitrators. *Cf. Painewebber, Inc. v. Elahi*, 1996 U.S. App. LEXIS 15949 (1st Cir. July 3, 1996); *Painewebber, Inc. v. Landay*, 903 F. Supp (D. Mass. 1995); *Bakk v. Principal Fin. Sec., Inc.*, 892 F. Supp. 1206 (D. Minn. 1995) (determination of arbitrability itself left to arbitrators). Second, there is a presumption in favor of finding arbitrability of a particular issue. In the present case, this means that Mr. Slinkard is entitled to a presumption that the arbitrators could consider his claims for punitive damages, attorneys' fees, and prejudgment interest. This presumption **is in addition to** the actual evidence found sufficient for such submission in *Mastrobuono*.

This analysis shows that the decision by the Oklahoma courts in the present case is not inconsistent with the decisions of the other state courts, the Courts of Appeals, or this Court. Therefore, Ameritas has not established jurisdiction under either Rule 10(b) or (c). Further, this analysis also indicates the absence of the second major consideration under Rule 10 for the granting of certiorari--that the present case present an "important federal question" which this Court needs to review and

settle. The federal issues presented have already been resolved by this Court and are being satisfactorily applied by the state and lower federal courts. No further guidance from this Court is necessary.

II. Other Factors Which Mitigate Against the Grant of Certiorari.

In order to give some bare credence to these lofty legal claims, Ameritas has ignored several pertinent points which undercut the alleged conflicts over which it urges this Court to take jurisdiction. For example, it claims as one of the issues presented is the pre-emption of the Oklahoma state rule against arbitrators granting punitive damages. As the Oklahoma Court of Appeals opinion in the present case acknowledged, there is no Oklahoma rule on this point. *See* Memorandum Opinion at p. 18A of Petition's Appendix. There simply is no statutory or decisional law as to whether Oklahoma would or would not follow the New York Rule of *Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), and prohibit arbitrators from making an award of punitive damages. Therefore, at this point, there is only a **potential** conflict.

In the same vein, Ameritas ignores the plain language of Oklahoma Uniform Arbitration Act § 10,

15 Okla. Stat. (1991) § 810, the language of which is reproduced in Petitioner's Brief, Appendix, p. 25A. This section does not prohibit the awarding of attorneys' fees by arbitrators. Instead, it merely requires that the agreement to arbitrate provide for the award of such fees. The "agreement" under this section should include not only Paragraph 13 of the Customer Agreement, but also the NASD Submission Agreement, Mr. Slinkard's statement of claim submitted to the arbitrators, and the conduct of the parties during the arbitration. As outlined in the previous point, all of these items viewed, both separately and collectively, make plain that it was the intent of the parties to have the issues of attorneys' fees determined by the arbitrators. Therefore, even if it were to apply, the requirements have been met for the arbitrators to award attorneys' fees under Section 10 of the Oklahoma Act.

While Ameritas no doubt will claim to the contrary that the language of these agreements did not provide the necessary agreement, Mr. Slinkard would point out that Ameritas made this argument in connection with post-award attorney fees. The argument convinced the Oklahoma Court of Appeals which held:

> "Ameritas contends the Option Agreement required that any controversy between the parties be submitted to the arbitrators. Slinkard cites [Section 408 of the Oklahoma Securities Act to support his claim for post--award interest and attorneys' fees]. We agree with Ameritas and hold that the trial court erred entering its July 1, 1994 order as to additional attorney's fees and costs."

Petitioner's Appendix at p. 22A.

CONCLUSION

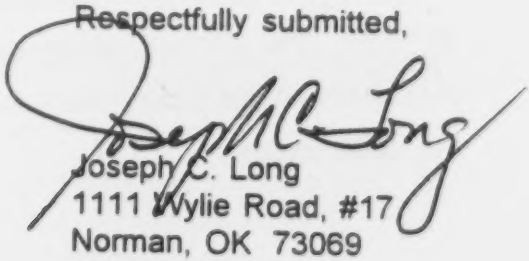
In summary, Ameritas' Petition contains nothing which suggest that this Court should exercise its discretion and grant the requested Writ. Ameritas has not established any kind of a conflict between the decisions of the Oklahoma courts and other state courts, the Courts of Appeal, or this Court which would support jurisdiction under Rule 10(b) or (c). It has not shown that the case presents "an important federal question" on which the guidance of the Court is required. Ameritas has ignored several major factual issues which undercut the validity of the questions it believes are presented. Finally, the decision of the Oklahoma courts appears to be accurate and correct when viewed in light of the precedent of this Court, the lower federal courts, and the state courts.

The Petition, Mr. Slinkard believes, was filed largely for the purpose of further delaying payment of the arbitration award and attempting to prevent the state district court from considering the collateral estoppel effect of such award on the thirteen remaining plaintiffs with essentially identical claims in the original class action suit.

The Petition has no substance. Stripping away the fancy legal claims, this case amounts to nothing more than a thinly veiled attempt by Ameritas to persuade a court to review the arbitrators' decision on the merits, something which the Federal Arbitration Act, 9 U.S.C. § 1 et seq., specifically prohibits. Three Oklahoma state courts have resisted the attempts of Ameritas to undertake a merits review and this Court should as well.

For these reasons, the petition for a writ of certiorari should be denied. Because the Respondent, Mr. Slinkard, believes the Petition for Writ of Certiorari to be frivolous, he requests the Court to award him just damages and double costs under Rules 42 and 43 of this Court.

Respectfully submitted,



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NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Steven M. Slinkard

92-03295

Names of Respondent(s)

Donaldson Lufkin & Jenrette Securities
Ameritas Investment Corporation

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1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the

Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or NASD Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

Party(ies) Signature

s/Rodney K. Vincent
Ameritas Investment Corporation

in the case of an offer or sale of a security by such means, to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender, less the value of the security when the buyer disposed of it, and interest at ten percent (10%) per year from the date of disposition, or